BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA ANN PHILLIPS	)	
Claimant	)	
	)	
VS.	)	Docket No. 244,924; 244,925;
	)	& 251,351
J.C. PENNEY CO. INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed Administrative Law Judge Robert H. Foerschler's Award dated August 3, 2001. The Board heard oral argument on February 5, 2002, by telephone conference.

APPEARANCES

Claimant appeared by her attorney, C. Albert Herdoiza. The self-insured respondent appeared by its attorney, Kip Kubin.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed there was no dispute with the Administrative Law Judge's decision in Docket No. 244,924. Accordingly, the Award in Docket No. 244,924 is affirmed in all respects.

ISSUES

The Administrative Law Judge consolidated the three docketed claims for trial and decision.

Docket No. 244,924 is a claim for repetitive injuries to the left upper extremity with an accident date of January 3, 1998, continuing each and every day thereafter. The

Administrative Law Judge awarded claimant a 5 percent permanent partial impairment to the left upper extremity as a result of this injury.

Docket No. 244,925 is a claim for injuries to the right and left upper extremities beginning on or about May 17, 1999, and continuing each and every day thereafter.

Docket No. 251,351 is a claim for bilateral upper extremity injuries caused by repetitive mini traumas beginning January 11, 2000, and continuing each and every day thereafter.

In the Award dated August 3, 2001, Judge Foerschler found claimant had sustained a 5 percent permanent partial impairment of the left upper extremity as a result of the 1998 injury in Docket No. 244,924. The Administrative Law Judge further determined claimant had sustained a 10 percent whole person permanent partial impairment for the bilateral upper extremity injuries that culminated on January 11, 2000.

The Administrative Law Judge determined the claimant was not entitled to a work disability because of her refusal to accept additional medical treatment which might improve her condition and that there was a failure to show her work disability was the result of her upper extremity injuries rather than a prior back injury.

The claimant briefed and argued the following issues on review in Docket Nos. 244,925 and 251,351: (1) the nature and extent of disability, specifically whether the claimant is entitled to a work disability; and, (2) the computation of the average weekly wage.

Conversely, the respondent contends the Administrative Law Judge's decision should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record filed herein, the stipulations of the parties, the parties' briefs and having considered the oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a sewer/seamstress for the respondent. Her primary duty was to hem catalog orders. After taking the pants from a package she would measure, cut and hem the pant leg. This task would be repeated 40-50 times an hour. On January 3, 1998, claimant experienced excruciating pain in her left hand and wrist and advised the company nurse. She was referred by the respondent to the offices of William Reed, M.D., but she saw Dr. Mark Deitch who was in the office on that day. Treatment consisted of cortisone shots and claimant was returned to work without restrictions.

However, upon her return to work her condition continued to worsen. Ultimately, Dr. Deitch performed a de Quervain's release on claimant's left wrist on January 4, 1999.

When claimant returned to work after the surgery she began to experience problems in both hands. Moreover, she testified her left hand never recovered following the first surgery and her wrist and hand continued to ache. On May 17, 1999, claimant advised the company nurse about the problems she was having which now included the right hand. On May 25, 1999, claimant additionally hand delivered a letter to the nurse detailing the bilateral complaints of upper extremity pain and asking for medical treatment. The claimant was again provided cortisone injections, however, upon her return to work the symptoms in her left and right hand continued to worsen.

In January 2000 claimant's right hand and wrist began locking up and the left hand and wrist pain worsened. Claimant was also experiencing aching and burning in her right shoulder and neck. Medical treatment was provided with Dr. Howard Waldman and Dr. Reed. Claimant was given accommodated duties of just measuring the pant legs with no sewing. However, her condition did not improve. On April 20, 2000, respondent referred claimant to Bradley W. Storm, M.D., for treatment. Dr. Storm noted an EMG study performed February 2000 indicated mild bilateral carpal tunnel. Dr. Storm recommended a de Quervain's release and an open carpal tunnel release with possible tenosynovectomy. Claimant refused because she understood Dr. Storm to say it was unlikely it would help her conditions.

The claimant continued in her accommodated job of measuring but not sewing until June 20, 2000. At that time claimant's supervisor advised her that her restrictions would no longer be accommodated. Claimant did not receive any further compensation from respondent and filed for and received unemployment benefits. Claimant sought employment and made at least two contacts a week while she was receiving unemployment benefits. After claimant was no longer eligible for unemployment benefits in October 2000, she continued to seek employment and kept a list which detailed where she had additionally sought employment.

Refusal of Medical Treatment

The Administrative Law Judge awarded claimant a 10 percent permanent partial impairment to the whole body for the bilateral upper extremity repetitive injuries claimant suffered in Docket Nos. 244,925 and 252,351. The Administrative Law Judge denied a work disability to the claimant, in part, based upon claimant's unreasonable refusal to undergo additional surgery.

The initial issue on review is whether the claimant's refusal to undergo the surgical procedure recommended by the doctors was unreasonable. Dr. Storm recommended claimant undergo a de Quervain's release and open carpal tunnel release with possible

tenosynovectomy. These procedures were recommended for claimant's right upper extremity. Dr. Reed recommended an endoscopic carpal tunnel release in either one of claimant's hands in order to see the result before performing the same procedure in the other hand. Dr. Prostic also recommended a carpal tunnel release on claimant's right which was the more symptomatic side when he last examined claimant.

K.A.R. 51-9-5 provides:

> An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or termination of compensation beyond the period of time that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal.

Drs. Prostic, Reed and Storm were deposed in this matter and offered opinions regarding the recommended surgeries. Although the doctors generally agreed that the risks associated with these types of surgery are extremely small, they did acknowledge that any surgical intervention has attendant risks. Such risks include infection, bleeding, nerve injury and scarring.

Dr. Storm opined that he would expect the probability for cure of claimant's problems would be over 90 percent. The doctor estimated the likelihood of relief of claimant's carpal tunnel symptoms would be over 95 percent. In addition, the doctor further opined based upon the incomplete relief from her first surgery, the likelihood of complete relief from the de Quervain's release would be 75 percent or greater with a 90 percent improvement of symptoms. Dr. Storm agreed he had performed the recommended surgeries on other patients where there had not been good results and the ability to return to work did not occur. Moreover, the doctor agreed that in his report he had noted "she [claimant] understands that it is not a sure thing that this would help her with her problems on the radial wrist." He explained that the notation meant complete relief from all claimant's symptoms was not a sure thing.

Edward J. Prostic, M.D., examined claimant on two occasions. After his last examination of claimant, he recommended claimant's carpal tunnel syndrome on the right be surgically addressed. Dr. Prostic further noted if he were the patient he would have the surgery but concluded that it was not unreasonable to decline the surgery because there is no assurance of improvement and there is a possibility the condition could worsen.

William O. Reed, Jr., M.D., had undertaken claimant's treatment after her de Quervain's surgery on her left wrist. Dr. Reed's treatment included cortisone injections in both of claimant's wrists. When that failed to provide relief, Dr. Reed recommended an endoscopic carpal tunnel release. But Dr. Reed noted when a patient does not respond

to steroid injections there is a corollary likelihood there may not be improvement with surgery. Accordingly, he recommended surgery only on one hand in order to see if there would be any improvement before performing surgery on the opposite hand. Dr. Reed agreed the prognosis for surgical treatment of claimant was considerably lessened because she had not responded to the steroid injections.

The claimant, after being apprised of the procedures and risks involved with surgery, determined not to undergo the surgical procedures because of the lack of assurance such procedures would alleviate her symptoms. Moreover, claimant had already had a de Quervain's release performed on her left wrist without improvement in her symptoms.

In Morgan v. Sholom Drilling Co., 199 Kan. 156, 427 P. 2d 448 (1967), the Court stated:

> In *Gutierrez v. Harper Construction Co.*, 194 Kan. 287, 398 P.2d 278, we considered the effect of the workmen's compensation director's rule 51-9-5. This rule states that *an unreasonable refusal* of the workman to submit to *surgical treatment*, where the danger to life would be small and the probabilities of a *permanent cure* great, ordinarily justifies refusal of compensation beyond the period of time the injured would have been disabled had he submitted to an operation.
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> In *Gutierrez* we said before refusal can be unreasonable under the director's rule the probabilities of a permanent cure must be great.
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> The medical testimony of all three orthopedist in the present case establish that in event the operation was successful the workman would still have residual permanent partial disability of ten percent. Under the evidence no permanent cure was possible and the director's rule does not apply. 199 Kan. at 161.

The director's rule referred to in the Morgan decision is the same in all material respects as K.A.R. 51-9-5. In Morgan the Court specifically noted that there was no evidence that the recommended treatment would be a permanent cure. The same factual situation is present in this case. Even if the proposed surgery was successful the claimant would likely have residual permanent partial disability as evidenced by the 5 percent awarded for the left upper extremity in Docket No. 244,924. In the absence of evidence that surgery would probably provide a permanent cure the regulation generally will not apply. In this case the claimant's refusal of the proposed surgeries was not unreasonable.

Nature and Extent

It is essentially undisputed that claimant was diagnosed with bilateral carpal tunnel syndrome which was confirmed by EMG testing in February 2000. After his final examination of claimant on March 6, 2000, Dr. Prostic concluded claimant suffered a 15 percent permanent partial impairment to the body as a whole based upon the AMA Guides, Fourth Edition. The Board adopts Dr. Prostic's opinion that as a result of her repetitive work-related bilateral upper extremity injuries claimant suffers a 15 percent permanent partial impairment of function to the body as a whole.

Work Disability

Because a bilateral extremity injury is an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e.[1] That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[2] and Copeland.[3] In Foulk, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

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[1] *See* Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, 947 P.2d 1 (1997).

[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

The claimant testified that on June 20, 2000, she was told her restrictions could no longer be accommodated. Claimant was additionally told she would be provided workers compensation benefits and contacted if work became available. Claimant was neither provided benefits nor offered employment and consequently sought unemployment benefits.

During the time claimant was receiving unemployment benefits she made the required number of weekly contacts seeking employment. After her unemployment benefits ceased in October 2000, claimant testified she continued to seek employment. She further testified regarding the employers she had contacted up to the date of her deposition on February 21, 2001. The Board finds claimant made a good effort to find appropriate work.

Claimant testified that in November 2000, as a favor for a friend, she began cleaning at Noel's Gift Shop once a week. Claimant testified she primarily cleans the bathroom and sweeps the shop. She is paid $50 a week. Because claimant's post-injury wages were not at least 90 percent of the pre-injury average weekly wage, claimant's permanent partial general disability should be based upon a work disability. Based upon claimant's actual post-accident wage of $50 per week, her wage loss is 90 percent.[5]

The next issue for determination is the percentage of task loss, if any. Respondent argues the determination of task loss should take into consideration Dr. Dale E. Darnell's testimony that he would have restricted claimant from performing some of the tasks claimant performed for respondent even before the current injury. Based on that testimony, respondent asks the Board to use in the task loss calculation only the additional task loss, if any, after the current injury.

Michael Dreiling met with claimant and prepared a task list based upon claimant's job history for the 15 years preceding her upper extremity injuries. The task list compiled by Mr. Dreiling contained one task from a job when claimant had worked for a hotel and the remainder reflected claimant's employment with respondent since 1987.

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[4] Copeland at 320.

[5] Claimant was unemployed from June 20, 2000, until November 2000 when she began the part-time job cleaning at the gift shop. Therefore, her wage loss during this time was 100 percent. But including this in the award calculation would not change the amount of benefits.

Dr. Prostic reviewed the task list and concluded claimant could no longer perform 8 of the 11 tasks which consisted of tasks 2 through 9. Respondent deposed Dr. Darnell who had treated claimant for a prior low back injury in 1993. Dr. Darnell opined based upon the restrictions he imposed in 1993, claimant would have been precluded from tasks 1 through 9.

Although Dr. Darnell opined his restrictions would have precluded claimant from performing her job tasks as a packer and sewer, nonetheless she was able to perform those job duties for respondent for several years after Dr. Darnell imposed his restrictions. This is compelling evidence that the prior work restrictions were not appropriate. Moreover, claimant testified that following her back injury she understood the only restriction she had was a 50-pound lifting restriction which exceeds the lifting restriction previously imposed by Dr. Darnell. The Board adopts Dr. Prostic's opinion that claimant can no longer perform 8 of 11 of tasks and accordingly has a 73 percent task loss.

A 90 percent wage loss and a 73 percent task loss results in a 81.5 percent work disability. Under K.S.A. 44-501(c), awards are reduced by the amount of preexisting functional impairment when a preexisting condition is aggravated. That statute provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The claimant had a preexisting functional impairment of 5 percent to her left upper extremity as a result of her work-related injury in Docket No. 244,924, and that left upper extremity injury was aggravated by her subsequent upper extremity injuries.

The Board finds the 5 percent permanent partial impairment of function to the left upper extremity is a preexisting functional impairment as contemplated by K.S.A. 44-501(c). In converting the 5 percent upper extremity impairment to a 3 percent whole body impairment, the Board finds respondent is entitled to a reduction of 3 percent from the overall award. Accordingly, the 81.5 percent work disability is reduced by the preexisting 3 percent which results in a 78.5 percent work disability.

Average Weekly Wage

Claimant argues the Administrative Law Judge erred because he failed to include alleged additional compensation in the computation of the gross average weekly wage. As noted by the Judge, the claimant failed to provide sufficient information to establish the value of the alleged additional compensation.

The statute governing the computation of the gross average weekly wage, K.S.A. 44-511, provides that additional compensation is included in the average weekly wage when it is discontinued. Claimant testified at the continuation of regular hearing that in March or April 1998 she had opted out of the respondent's health plan and was included on her husband's policy. Therefore, she was not receiving such additional compensation for the dates of accident in Docket Nos. 244,925 and 251,351. Accordingly, any contention that her average weekly wage should include that benefit is denied.

The Board adopts the Judge's conclusion that claimant was earning $12.41 an hour on the date of accident. Moreover, the exhibits attached to Horace L. Smith's deposition support the Judge's conclusion the claimant averaged 1.5 hours overtime for the 26-week period preceding her date of accident. This results in an average weekly wage of $524.33.

Date of Accident

Claimant originally complained of bilateral upper extremity pain beginning in May 1999 (Docket No. 244,925) and continued with those same complaints worsening in January 2000 (Docket No. 251,351). Claimant received medical treatment following her complaints in May 1999 but returned to her same sewing job without restrictions. When her complaints worsened in January 2000 she again received medical treatment. It was not until approximately February 9, 2000, after Dr. Reed released claimant to light-duty work, that she was placed on the measuring job. Claimant noted she did not have any problem performing the light-duty accommodated job of measuring. She continued to perform this accommodated light-duty work through her last day worked on June 20, 2000.

Following creation of the bright line rule in the 1994 Berry[6] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In Treaster,[7] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. Treaster can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is

[6] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[7] Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

> simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[8]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[9]

The light-duty job of measuring was assigned to claimant to accommodate her work restrictions and, therefore, claimant experienced a significant change in job duties when she moved from the sewing job. Therefore, claimant's change to the measuring job on February 9, 2000, should be considered the date of accident for purposes of calculating benefits for the consolidated repetitive trauma claims in Docket Nos. 244,925 and 251,351.

AWARD IN DOCKET NO. 224,924

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 3, 2001, is affirmed in all respects.

AWARD IN DOCKET NOS. 224,925 & 251,351

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 3, 2001, in Docket Nos. 224,925 and 251,351 is modified to reflect that claimant is entitled to a 78.5 percent work disability.

The claimant is entitled to 325.78 weeks at $349.57 per week for a 78.5 percent permanent partial general bodily disability not to exceed $100,000.

As of April 25, 2002, there would be due and owing to the claimant 115.14 weeks permanent partial compensation at $349.57 per week in the sum of $40,249.48 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining

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[8]Treaster, Syl. 3.

[9]Treaster, Syl. 4.

balance in the amount of $59,750.52 shall be paid at $349.57 per week until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of April 2002.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Kip Kubin, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director